Geodis Logistics, LLC *and* Mary Alexis Ray *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service-Workers Union, AFL–CIO–CLC. Cases 15–RD–217294 and 15–RD–231857

June 30, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

The Employer's Request for Review of the Regional Director's Order Denying Employer's Second Renewed Request to Reinstate Decertification Election Petitions is granted as it raises substantial issues warranting review with respect to whether the remedial period associated with the settlement of the unfair labor practice charges is complete under *Truserv Corp.*, 349 NLRB 227 (2007). Pursuant to Section 102.67(h) of the Board's Rules and Regulations, the parties may file briefs addressing this issue with the Board within 10 business days after issuance of this order.

Dated, Washington, D.C. June 30, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

There are two reasons to deny review of the Regional Director's decision in this case, which involves an employer's attempt to revive decertification petitions filed by an employee. Both reasons are firmly rooted in the National Labor Relations Act and Board precedent.

The first reason is fundamental. An *employer* has no statutory standing to seek the reinstatement and processing of a decertification petition that has been dismissed by a Regional Director. Under Section 9(c)(1)(A) of the Act, the right to file a decertification petition belongs only to "an employee or group of employees or any individual or labor organization acting in their behalf."[1] "[D]ecertification proceedings provide a remedy exclusively for and on behalf of employees, and not of employers." *Morganton Full Fashioned Hosiery Co.*, 102 NLRB 134, 134 (1953). The employee who filed these petitions has not sought their reinstatement, and the plain language of Section 9(c)(1)(A) makes clear that an employer is not one of the entities that can properly be deemed to be "acting in [employees'] behalf" in pursuing decertification.[2]

Indeed, as long interpreted by the Board, the Act prohibits an employer from providing direct assistance to employees seeking decertification or acting on behalf of employees in connection with their decertification petitions.[3] And Board precedent holds that when a Regional Director dismisses a decertification petition, the right to request reinstatement of the petition belongs to employees, acting through the employee-petitioner (not the employer).[4] Here, the Employer might have filed its own election petition, but it chose not to.[5] It is not free now to take over

[1] Sec. 9(c)(1)(A) provides, in relevant part, that "an employee or group of employees or any individual or labor organization acting in their behalf" may file a petition alleging that a substantial number of employees "assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in" Sec. 9(a). 29 U.S.C. §159(c)(1)(A).

[2] The Supreme Court has explained that the Board is

> entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition *from the workers* if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom.

Auciello Iron Works v. NLRB, 517 U.S. 781, 790 (1996) (emphasis added).

[3] See generally *Pic Way Shoe Mart*, 308 NLRB 84, 84 (1992) (employer violated Sec. 8(a)(1) by assisting employees in processing decertification petition, where it contacted and worked with labor consultant who filed decertification petition on behalf of the employer's employees); *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) ("[I]t is unlawful for an employer to . . . lend more than minimal support and approval to . . . the filing of the [decertification] petition."); *Clyde J. Merris*, 77 NLRB 1375, 1377 (1948) ("To permit supervisors to act as employee representatives [in a decertification proceeding] would . . . defeat the purposes of the Act.") (footnote omitted).

[4] *Truserv Corp.*, 349 NLRB 227, 228 (2007) ("[A] timely filed decertification petition that has met all of the Board's requirements should be reinstated and processed *at the petitioner's request* following the parties' settlement and resolution of the unfair labor practice charge.") (emphasis added); *Nu-Aimco, Inc.*, 306 NLRB 978, 979 (1992) ("[T]he policy of dismissing a petition or holding it in abeyance because of pending unresolved unfair labor practice charges . . . . postpones processing the petition until the unfair labor practice charges are resolved, at which time *the petitioner is entitled to request reinstatement of the petition.*") (emphasis added).

[5] Sec. 9(c)(1)(B) permits an employer to file an election petition when "one or more individuals or labor organizations have presented to him a claim to be recognized as the representative." 29 U.S.C. §159(c)(1)(B). The Board has interpreted this provision to permit an employer to file its own petition not only when a union seeks initial recognition from the employer, but also when the employer has a proper basis to challenge the

an employee-initiated decertification effort that employees themselves seem to have abandoned. Permitting the Employer to do so goes far beyond permitting merely ministerial assistance to employees seeking decertification. Instead, the Board would effectively license an unfair labor practice.

But even if the Employer had standing to seek reinstatement of its employee's decertification petitions when the employee has not done so, the Employer clearly has failed to raise substantial issues warranting review. The Employer's contentions all relate to the Regional Director's processing of unfair labor practice case matters. Our case law demonstrates that those contentions are not properly before the Board in this representation proceeding, in light of the General Counsel's unreviewable prosecutorial discretion under Section 3(d) of the Act.[6]

For both of these reasons, then, I would deny review. The majority's decision here quite simply grants the Employer a right that the Act forecloses and thus cannot be correct.

Dated, Washington, D.C. June 30, 2021

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

majority status of an incumbent union. See *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 720 & fn. 24 (2001).

[6] See, e.g., *Mistletoe Express Service of Texas, Inc.*, 268 NLRB 1245, 1247 (1984) ("The Board has often held that it will not litigate unfair labor practice allegations in a representation proceeding."); *Kennicott Bros. Co.*, 256 NLRB 11, 12 (1981) (noting that union's contention regarding disposition of complaint was not properly before Board in representation proceeding). See generally *NLRB v. UFCW Local 23, AFL–CIO*, 484 U.S. 112, 127–128 (1987) (Sec. 3(d) of the Act, 29 U.S.C. §153(d), provides General Counsel unreviewable discretion over prosecutorial decisions).